United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-2157

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

JOHN ROTHWELL,

APPELLANT PRO SE

vs.

Docket No. T 6752
76-2157

UNITED STATES OF AMERICA,

APPELLEE

- -x

BRIEF + APPENDIX

B
P/S

Background

The Appellant Pro Se, JOHN ROTHWELL respectfully appeals from the denial of his motion pursuant to Title 28 U.S. Code 2255 to vacate the sentence imposed by the Hon. Emmett Clarie on April 2, 1973. Judge Clarie sentenced the Appellent to a term of four years imprisonment pursuant to Title 18 U.S.C. 4208 (a)(2).

At the time of the Appellent's sentencing, the Parole Board followed a procedure which would have resulted with the Appellant serving one third or less of his sentence in cases where the prisoner has been sentenced under that provision of the penal code. In November, 1973, some eight (8) months after the sentencing, the Parole Board first promulgated a system of guidelines which were first put into effect in April, 1974. These guidelines largely nullified the Congressional Intent of sentencing under the provisions of Title 18 U.S.C. 4208 (a)(2).

The Appellant filed his motion under Title 28 U.S.C. 2255 on July 20, 1976. A Traverse was filed by the United States Attorney for the District of Connecticut on September 7, 1976. The Appellant then filed his traverse which was duly answered by another traverse on September 28, 1976. Again, the Appellant filed a traverse. The instant Petition was denied by Hon. Emmett Clarie on October 1, 1976. The reason given for that denial by Judge Clarie was, " Nothing in the Parole Board's action in exercising its discretion runs contrary to this court's original intention. It is not the Court's perogative to second-guess the Parole Board. They decided that a decision outside the parole guidelines was not warranted, a discretion which the Court intentionally vested in them at time of sentencing." Judge Clarie then continued to say, "Under Rule 35, Fed. R. Crim. P., entitled "Correction or Reduction in Sentence," the Court is authorized to "reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgement or dismissal of the appeal, or within 120 days after entry of any judgement or order of the Supreme Court denying review" Jurisdiction under this rule has passed and the Court is without authority to act."

The Appellant maintains that the Court could not have vested in the Parole Board the discretion to utilize a

system of Guidelines which were not even promulgated at the time of the Appellant's sentencing. Furthermore, the Court completely ignored the thrust of the Petition which was under Title 28 U.S.C. 2255 and answered only as if it was denying a Motion under Rule 35, F.R.C.P.

The Appellant believes that the Court refused to face the issues of law and questions of fact raised in the original Petition and then attempted to deny the Appellant's motion using"Lack of Jurisdiction" for the bottom line. The Appellant prays this Honorable Court to Reverse and Remand the decision of the District Court and Order a Hearing Before a different District Court Judge so that all issues of law and questions of fact can be resolved.

MEMORANDUM OF LAW

The language of the law was very clear in Kortness v. United States, 8th Circ, 1975 (17 Crl 2123) where the court said," without access to these guidelines, the sentencing Judge was entitled to assume that the 4208 (a)(2) would make a difference in the inmate's parole expectations." In a more recent case, Silverman v. United States, ____F2d___, [3rd Circ Docket #76-1213, July 27, 1976] the court ruled," William Silverman appeals from the District Court's denial of his 28 U.S.C. 2255 motion to vacate and correct the criminal sentence under which he is presently incarcerated. He contends that because of facts unknown to the sentencing Judge, that Judge sentenced him under a misapprehension of the Parole consequences of the sentence. Because we are pursuaded by the proposition,

we reverse the decision of this district court and direct that appellant be resentenced." see also United States v. Slutsky, 514 F.2d 1222 [2nd Circ. 1975], U.S. v. Mandeville, 396 Fed Supp 1244 and Grasso v. Norton, 520 F.2d 27 [2nd Circ].

As to the question of Jurisdiction, Judge Clarie completely ignored the thrust of Title 28 U.S.C. 2255 and attempted to rely on the theory that the Petition was in fact a tardy motion under Rule 35, Fed. Rules of Crim. Pro. The clear intent of that section is to open a Criminal sentence and its imposition to collateral attack at any time. See: Silverman v. United States [supra], Kortness v. United States, [supra], Andrews v. United States, 373 U.S. 334, 339 (1963), U.S. v. Lewis , 392 F.2d 440 [4th Circ 1968], Robinson v. United States, 313 F.2d 817 [7 Circ 1963], Hamilton v. Salter, 361 F.2d 579 and United States v. Tucker, 404 U.S. 443 (1972).

The Appellant, like Kortness, Silverman and Slutsky before him was sentenced under 4208 (a)(2) before Board Policy of utilizing a arbitrary set of guidelines to determine parole eligibility. The Judiciary, not being aware of those guidelines could not have expected that sentencing under the provisions of Title 18 U.S.C. 4208 (a)(2) would be meaningless. The appellant like Kortness before him, therefore has stated a claim cognizable under 28 U.S.C. 2255. The District Court did have jurisdiction to correct, vacate or re-sentence the appellant and should have ordered a hearing so that all questions of fact and issues of law could have been answered. The District Court, however, chose

to ignore all issues of law and treat the appellant's petition as a "tardy Rule 35". The Appellant is sure that the record on appeal speaks for itself.

The Appellant also prays this honorable court to Vacate and Remand this instant case and Order a Hearing before a different District Court Judge. The appellant moves that the Hon. Emmett Clarie might have already reached conclusions in this case and it would be difficult for an objective hearing to be held in his court. See: United States v. Rosner, 485 F.2d 1213,1231; United States v. Schwartz, 500 F.2d 1350 [2 Circ 1974]; O'Shea v. United States, 491 F.2d 774,778-80 [1st Circ]; Wingo v. Wedding, 418 U.S. 461,473 n.19 [1974] and United States v. Stein, ____F.2d___, [2nd Circ 10-22-76,docket #76-1299].

Conclusion

The Appellant concludes with the premise that the Hon. Emmett Clarie chose to overlook the issues of law and questions of fact in this instant petition. The Intent of Title 28 U.S.C. 2255 is crystal clear. The imposition of a criminal sentence open to collateral attack is precisely the very thrust of that Section of the U.S. Code. A Motion may be made at any time . No amount of tortured logic will convince the Appellant nor this Honorable Court that the Appellant was merely filing a tardy Rule 35. The Hon. Emmett Clarie should have ordered a hearing on this matter so that all issues of law and questions of fact could be answered. The Appellant believes that this Court will Vacate and Remand

this Petition and Order a Hearing before a Different District Court Judge so that a miscarraige of Justice will be prevented.

Respectfully submitted:

John Rothwell

JOHN ROTHWELL,
Appellant Pro Se
P.O. Box 1000
Montgomery, Pa., 17752

CERTIFICATION

This is to certify that a copy of this Brief and Memorandum of Law was mailed to the United States Attorney for the District of Connecticut, Hartford, Connecticut.

John Rothwell

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MAR 7 1977

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vs.

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UNITED STATES OF AMERICA,

Appellee

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APPENDIX

1: Issues of Law and question of fact raised in Appellant's brief: See:
(a) Document #1
(b) Document #3
(c) Document #5

2: Question of Law regarding Judge Clarie's denial of Motion. See:
(a) Document #6 page 3,4, indicate clearly that Judge Clarie never considered Petition as anything other than a tardy Motion under Rule 35, Fed. Rule of Crim. Pro.

Respectfully submitted:

JOHN ROTHWELL
Appellant Pro Se
P.O. Box 1000
Montgomery, Pa., 17752

John Rothwell

sb

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